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DID THE U.S. SUPREME COURT RECOGNIZE AN ELUSIVE OR ILLUSIVE JUDICIAL TAKING IN STOP THE BEACH RENOURISHMENT?

DEREK LESLIE *

I. INTRODUCTION

The storm left its mark on the area. Houses were flattened.¹ Local business, with their windows shattered and their property in ruins, had been hammered by the powerful winds and torrential downpour.² The local church lost its roof and the beaches had washed out to sea.³ Trees had fallen and other debris was littered everywhere.⁴ Gale-force winds and strong waves had pushed the sand inland, giving everything a gritty, dirty texture.⁵ For residents lucky enough to still have their homes, water and power would take days to restore.⁶

Such was the scene as residents returned to what remained of their homes along Florida's Gulf Coast after Hurricane Opal tore through the area in 1995.⁷ The storm ravaged homes, resorts, condominiums, and small businesses of local residents, turning their lives upside-down.⁸ The storm killed fifteen people in four states and caused billions in property damage, yet for the Florida Gulf Coast, hurricanes like Opal are not unheard of and are actually an expected part of everyday life for the typical Floridian.⁹

For beachfront residents in particular, the multitude of hurricanes represents a variety of dangers, some of which are only now becoming fully apparent. Beachfront landowners are extremely vulnerable to the devastating effects of hurricanes, becoming the first and most likely targets

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¹ Rene Sanchez, *Opal Kills 15 in Assault on South*, Wash. Post, Oct. 6, 1995, at A1.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ Sanchez, *supra* note 1.

⁸ *Id.*

⁹ *Id.*

as storms make landfall with blistering winds and strong waves. The pelting not only affects homes and man-made property, the images that make the news the next day, but the storms also greatly damage the beaches, eroding the coastline and potentially whittling away the beachfront landowners' real property.

In *Stop the Beach Renourishment* ("Beach Renourishment"), the Florida Department of Environmental Protection ("FDEP") issued permits to the city of Destin and Walton County to repair the damage erosion had caused on their beaches.¹⁰ Beachfront landowners formed "Stop the Beach Renourishment, Inc.", a non-profit corporation through which the landowners sued to stop this action.¹¹ The Florida District Court of Appeal reversed and remanded the FDEP's decision,¹² and also certified a question to the Florida Supreme Court, asking it to consider whether the Beach and Shore Preservation Act, the Florida statute upon which the agency action relied, unconstitutionally deprived property owners of their littoral rights without just compensation.¹³ The Florida Supreme Court answered the certified question in the negative, quashed the remand, and denied a rehearing.¹⁴ After granting certiorari, the United States Supreme Court found that the lower court's action did not constitute an unconstitutional taking of the beachfront landowners' property rights.¹⁵ In doing so, the Court upheld the FDEP's permit grant and allowed the restoration of the eroded beaches.¹⁶

This Note will explore the significance of the U.S. Supreme Court's recognition of the possibility of a judicial taking and its effect on environmental land disputes. Section II will examine the necessary legal background. Section III will detail the relevant facts and procedural history of *Beach Renourishment*. Next, Section IV will analyze Justice Scalia's plurality opinion and the various concurrences. Finally, Section V will attempt to synthesize the disparate views of the members of the Supreme Court and draw conclusions regarding the direction of the Court's Takings Clause jurisprudence.

¹⁰ *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot. et al.*, 130 S.Ct. 2592, 2600 (2010).

¹¹ *Id.*

¹² *Id.*

¹³ *Walton County v. Stop the Beach Renourishment, Inc.*, 998 So. 2d 1102, 1105 (Fla. 2008).

¹⁴ *Id.* at 1102, 1105.

¹⁵ *Beach Renourishment*, 130 S.Ct. at 2613.

¹⁶ *Id.* at 2595.

II. LEGAL BACKGROUND

A. State Property Law

Generally, state law defines property interests, and these interests can take various forms.¹⁷ In Florida, the State owns any land permanently submerged beneath navigable waters as well as any land up to the mean high-water line.¹⁸ This land is held in trust by the state for the public as a whole.¹⁹ In contrast, land above the mean high-water line may be privately owned.²⁰ This privately owned beachfront land is known as littoral²¹ property, which comes with certain attendant rights. Littoral property owners, by virtue of their connection with the water, enjoy rights similar to easements.²² These rights include “the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property.”²³

Central to *Beach Renourishment* are the rights to receive accretions and relictions.²⁴ Under Florida law, littoral property owners have the right to any dry land added gradually and imperceptibly to their existing property, i.e. dry land added by accretion.²⁵ These changes are gradual and are only noticeable over extended periods of time.²⁶ This is in marked contrast to avulsions, which are “sudden or perceptible loss[es] of or addition[s] to land by the action of the water or a sudden change in the bed of a lake or the course of a stream.”²⁷ In Florida, as at common law, land created by avulsion retains its character as it was submerged.²⁸ Thus, in the case of avulsion, the State retains ownership of the newly dry land.²⁹

¹⁷ *Id.* at 2597.

¹⁸ *Id.* at 2597-98.

¹⁹ *Id.*; *See Broward v. Mabry*, 50 So. 826, 829-30 (Fla. 1909).

²⁰ *Beach Renourishment*, 130 S.Ct. at 2598.

²¹ *Id.* at 2598. The Court adopted the terminology used by the Florida Supreme Court, distinguishing “riparian” and “littoral,” where “riparian” means abutting any body of water and “littoral” means abutting an ocean, sea, or lake. *See id.*, FN 1, p. 2598.

²² *See Broward*, 50 So. at 830; *See also Thiesen v. Gulf, Fla. & Ala. Ry. Co.*, 78 So. 491, 507 (Fla. 1918).

²³ *Beach Renourishment*, 130 S.Ct. at 2598.

²⁴ *Id.* Accretions will be used in this Note to generally refer to accretions and relictions. The difference in terms is minor: accretions are additions of alluvion, i.e., sand, sediment, or other deposits, to waterfront land. Relictions, on the other hand, are lands that were once submerged by water that have become dry because the water has receded. *Id.*

²⁵ *Id.*

²⁶ *Id.* (citing *Bd. Of Tr. of Internal Improvement Trust Fund v. Sand Key Assoc., Ltd.*, 512 So. 2d 934, 936 (Fla. 1987)).

²⁷ *Sand Key Assoc., Ltd.*, 512 So. 2d at 936.

²⁸ *Beach Renourishment*, 130 S.Ct. at 2598-99.

²⁹ *Id.*

The permit central to *Beach Renourishment* was issued pursuant to the Beach and Shore Preservation Act ("BSPA").³⁰ The Florida legislature passed the BSPA in 1961 to establish procedures to restore and preserve the condition of beaches eroded by the elements.³¹ Specifically, the BSPA provides for beach restoration and nourishment projects.³² Through these projects, the State may deposit sand on eroded beaches and attempt to maintain the deposited sand.³³ Procedurally, local governments apply to the FDEP for the money required for a project as well as the necessary permits for restoration.³⁴ Pursuant to the statute, the Board of Trustees of the Internal Improvement Trust Fund must approve such projects when they require placing fill on the state's submerged lands.³⁵ The Fund holds title to these lands.³⁶

Once these hurdles are overcome, the project may begin. First, the Board of Trustees of the Internal Improvement Trust Fund must establish an "erosion control line."³⁷ This line, set in reference to the existing mean high-water line, replaces the fluctuating mean high-water line as that which demarcates between the privately owned beach and the submerged state property.³⁸ By fixing where the line is drawn, the littoral property owners' right to future accretions is effectively cut off.³⁹

B. The Takings Clause

The Takings Clause of the Fifth Amendment of the U.S. Constitution reads, "nor shall private property be taken for public use, without just compensation."⁴⁰ The prototypical Takings Clause situation is that of eminent domain, where a governmental objective requires the use of a private individual's land; then, for the government to seize the property in question, it must pay the private owner just compensation for his or her property interest.⁴¹ This presents an important limit on the government's power. The Fourteenth Amendment ensures that the rights secured in the

³⁰ *Id.* at 2599-600.

³¹ *Id.* at 2599. (citing Beach and Shore Preservation Act, Fla. Stat. §§161.011-161.45 (2007)).

³² *Id.*

³³ *Id.*

³⁴ *Beach Renourishment*, 130 S.Ct. at 2599.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ U.S. Const. amend. V.

⁴¹ See generally *U.S. v. Causby*, 328 U.S. 256, 261-262 (1946) (a couple sought just compensation from the U.S. for the alleged taking of their property through the operation of a municipal airport next to their home and chicken farm); *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177-78 (1871) (Takings Clause suit for just compensation after the state of Wisconsin approved the construction of a dam which ultimately caused the river to overflow onto the Plaintiff's private property).

Bill of Rights, including those found in the Takings Clause, also apply to state action.⁴²

The Takings Clause, however, is not limited to the eminent domain situation. Courts have also been amenable to a broader view of governmental takings.⁴³ The Takings Clause is equally implicated by the taking of other property rights, not merely the taking of an estate in land.⁴⁴ Courts have also recognized a taking of private property when the government has used its own property in such a way that destroyed the prior use of the private property.⁴⁵

Moreover, the U.S. Supreme Court has recognized the existence of regulatory takings.⁴⁶ In these circumstances, a taking occurs where state regulations force a property owner to submit to a permanent physical occupation, as in the case of roof cables.⁴⁷ A regulatory taking could also occur where state regulation deprives a private property owner of all economically beneficial use of his or her property.⁴⁸ Likewise, a governmental taking may occur where the government re-characterizes land that had been private property as public property.⁴⁹

III. FACTUAL AND PROCEDURAL BACKGROUND

In 2003, the city of Destin and Walton County submitted an application for the permits required under the BSPA to restore almost seven miles of eroded beach.⁵⁰ The plan required dredging sand from off the coast and depositing it along the beach, adding about seventy-five feet of dry sand beyond the mean high-water line.⁵¹ In response to the applications, the FDEP issued a notice of intent to award the permits.⁵² Stop the Beach Renourishment, Inc., (“Petitioner”) a nonprofit corporation formed by beachfront property owners potentially affected by the plan,

⁴² *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 238-39 (1897).

⁴³ See *Causby*, 328 U.S. at 261-62; *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870).

⁴⁴ E.g. *Yates v. Milwaukee*, 77 U.S. 497, 504 (1870) (the U.S. Supreme Court finding a state taking of the rights of a licensee to private property).

⁴⁵ E.g. *Causby*, 328 U.S. at 261-62.

⁴⁶ *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537-38 (2005) (stating that the Court’s prior cases each sought to “identify regulatory actions that are functionally equivalent to the classic taking in which in which government directly appropriates private property or ousts the owner from his domain).

⁴⁷ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982) (holding that “a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve).

⁴⁸ *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1004 (1992).

⁴⁹ *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163-65 (1980) (holding that “a State, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court).

⁵⁰ *Beach Renourishment*, 130 S.Ct. at 2600.

⁵¹ *Id.*

⁵² *Id.*

brought an administrative challenge to the proposed permits.⁵³ This challenge failed, and the FDEP approved the permits.⁵⁴ Petitioner then challenged the award of the permits in state court pursuant to the Florida Administrative Procedure Act.⁵⁵ The District Court of Appeal for the First District sided with Petitioner, finding that the permits had eliminated two of the members' littoral rights.⁵⁶ The court found that the members' rights to receive accretions to their property and to have their property touch the water were both eliminated.⁵⁷ The court therefore held that this plan was an unconstitutional taking of private property.⁵⁸ Setting aside the FDEP's final order approving the permits, the court of appeal remanded the action for a showing that the local governments owned a property interest in the beachfront property.⁵⁹ The court also certified a question to the Florida Supreme Court, asking if "on its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?"⁶⁰

The Florida Supreme Court, reading the question as a state constitutional issue, was not swayed by the lower court's analysis.⁶¹ In finding for the FDEP, the Florida Supreme Court relied on the doctrine of avulsion, as well as general real property principles.⁶² This court found that the littoral property owners' rights were not infringed.⁶³ Instead, the court characterized their interest in accretions as a contingent interest rather than a vested property right.⁶⁴ Moreover, the court concluded that no right of contact with the water existed, but, instead, littoral property owners possessed merely a right of access to the water.⁶⁵ This right, the court found, would be unaffected by the state action.⁶⁶ Relying on these conclusions, the Florida Supreme Court answered the certified question in the negative and quashed the lower court's remand.⁶⁷ Petitioner sought a rehearing, suggesting that the court's decision itself represented a taking of the members' littoral rights contrary to the Fifth and Fourteenth

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Beach Renourishment*, 130 S.Ct. at 2600.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 2600, n.3.

⁶² *Beach Renourishment*, 130 S.Ct. at 2600.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 2600.

Amendments of the U.S. Constitution.⁶⁸ The request was denied and the U.S. Supreme Court granted certiorari.⁶⁹

The U.S. Supreme Court granted certiorari despite the fact that the state court did not address the issue that was first presented to it in a petition for rehearing. Although unusual, review is not barred (and may be warranted) where the state court decision itself is claimed to be a violation of federal law.⁷⁰

IV. THE COURT'S ANALYSIS

A. Justice Scalia's Plurality Opinion

Justice Scalia wrote the opinion of the Court in *Beach Renourishment*.⁷¹ All eight Justices agreed that in this case the Florida Supreme Court's action did not constitute a judicial taking.⁷² In parts II and III of his opinion, Justice Scalia, along with three other Justices, recognized the possibility of judicial taking under the Takings Clause of the Fifth Amendment of the U.S. Constitution.⁷³ Justice Scalia's opinion focused on the Takings Clause's emphasis on the "taking" act, rather than on a specific governmental actor.⁷⁴ Relying on his textualist approach, he noted that the language of the Clause failed to say that the existence or scope of a state's power to take private property differed depending on the branch of government exerting the power.⁷⁵ Indeed, he suggested that the notion would offend common sense.⁷⁶ From this analysis, Justice Scalia concluded that takings affected by the judicial branch should be treated just like any other governmental taking.⁷⁷ The Justice pointed to the *PruneYard Shopping Center*⁷⁸ and *Webb's Fabulous Pharmacies*⁷⁹ cases as precedent for this view.

In *PruneYard*, the California Supreme Court overruled its prior precedent, which had not required private property owners to permit others to exercise their freedoms of speech, press, and petition as guaranteed by the California State Constitution on such private property.⁸⁰ In the case,

⁶⁸ *Beach Renourishment*, 130 S.Ct. at 2600.

⁶⁹ *Id.*

⁷⁰ *Id.* at 2601 n.4, (citing *Adams v. Robertson*, 520 U.S. 83, 89 n.3 (1997); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930)).

⁷¹ *Beach Renourishment*, 130 S.Ct., at 2597.

⁷² *Beach Renourishment*, 130 S.Ct. at 2613 (Kennedy, J., concurring).

⁷³ *Id.* at 2601-2610.

⁷⁴ *Id.* at 2601.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980).

⁷⁹ *Webb's Fabulous Pharmacies*, 449 U.S. at 163-65.

⁸⁰ *PruneYard*, 447 U.S. at 79-80.

shopping center owners argued that their preexisting property rights could not be "denied by invocation of a state constitutional provision *or by judicial reconstruction of a State's laws of private property*."⁸¹ The U.S. Supreme Court, using the prototypical Takings Clause analysis, held that there had been no taking.⁸² The opinion focused on the alleged taking by the state constitutional provision, but Justice Scalia quickly suggested that this was irrelevant and that the same Takings Clause analysis should be applied when analyzing alleged takings by the judiciary's interference with an established property right.⁸³

Justice Scalia also pointed to *Webb's Fabulous Pharmacies* as precedent for the idea that judicial takings should be treated the same as more traditional takings.⁸⁴ In *Webb's Fabulous Pharmacies*, the Florida Supreme Court interpreted a state statute to suggest that the interest on an account established in an interpleader action should go to the county as "public money."⁸⁵ The U.S. Supreme Court held that the interest on an interpleaded fund should be allocated to the ultimate owner of the principal that had been taken either by the relevant state statute or the state court's decision.⁸⁶ The Court concluded that neither the state legislature via statute nor the courts via decision could re-characterize the property as public without it constituting a taking within the meaning of the Takings Clause.⁸⁷

After reviewing the text of the Takings Clause and the Court's prior precedent in this area, Justice Scalia concluded that the Takings Clause barred any state actor from taking private property without just compensation, with only the caveat that the character of the state action may be relevant.⁸⁸

It is a matter of routine that courts regularly affect private owners' property rights while fulfilling their constitutional mandates. The difficulty then, as Justices Kennedy and Breyer cautioned in their opinions, is drafting a suitable test for determining when a court has affected a judicial taking without just compensation. The Plaintiff in *Beach Renourishment* argued in favor of a "predictability of change" test.⁸⁹ Using this test, a judicial taking occurs when a court's decision reflects a sudden change in state law, one that is unpredictable from the relevant precedent.⁹⁰ Justice Scalia found this test wanting, suggesting that it would "cover both too much and too

⁸¹ *Id.* at 79.

⁸² *Id.* at 82-84.

⁸³ *Beach Renourishment*, 130 S.Ct. at 2602.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*; *Webb's Fabulous Pharmacies*, 449 U.S. at 162.

⁸⁷ *Beach Renourishment*, 130 S.Ct. at 2602; *Webb's Fabulous Pharmacies*, 449 U.S. at 164.

⁸⁸ *Beach Renourishment*, 130 S.Ct. 2602. Scalia concedes that while some actions may always be a taking, others may depend on its nature and extent. *Id.*

⁸⁹ *Id.* at 2610.

⁹⁰ *Id.* (citing Brief for Petitioner 17, 34-50).

little.”⁹¹ He believed the test to be over-inclusive when it would attack an unpredictable decision, but did nothing to change the status of private property as it exists under established law.⁹² On the other hand, Justice Scalia also found the test to be under-inclusive in that it would not find a taking where prior precedent had foreshadowed the judicial elimination of an established private property right.⁹³

Rejecting Plaintiff’s “predictability of change” test, Justice Scalia instead advocated for an “established property right” test.⁹⁴ Here, a court would consider whether the allegedly taken property right was established.⁹⁵ This approach requires the private property owner first show that he or she has an established property right.⁹⁶ In this case, it would be necessary for Plaintiff to show that the littoral-property owners had “rights to future accretions and contact with the water superior to the State’s right to fill in its submerged land.”⁹⁷ Second, Plaintiff would have to establish that the lower court’s decision abolished these rights, or in other words, “took” these rights from the littoral owners.⁹⁸ Using his proposed “established property right” test, Justice Scalia found that Plaintiff could not show that the owners held an established property interest superior to that of the state and thus were unable to meet the first part of this two-prong test.⁹⁹

Justice Scalia’s opinion relied on two Florida property law principles.¹⁰⁰ First, Florida property law permits the state, as the owner of submerged land, to fill that land as long as it does not interfere with the rights of either the public or the littoral property owners.¹⁰¹ Second, state property law principles dictate that accretions that add to previous avulsions add to state property rather than to private property.¹⁰² This follows logically from the principles of avulsions and accretions because avulsions cut off a private owner’s right to accretions. Justice Scalia found that state law also supported this result.¹⁰³ In particular, Justice Scalia relied upon *Martin v. Busch*.¹⁰⁴ In that case, the state drained water from a state-owned

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Beach Renourishment*, 130 S.Ct. at 2608-11.

⁹⁵ *Id.* at 2610.

⁹⁶ *Id.*

⁹⁷ *Id.* at 2611.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Beach Renourishment*, 130 S.Ct. at 2611.

¹⁰¹ *Id.* (citing *Hayes v. Bowman*, 91 So. 2d 795, 799-800 (Fla. 1957); *Buford v. Tampa*, 102 So. 336, 341 (Fla. 1924)).

¹⁰² *Beach Renourishment*, 130 S.Ct. at 2611.

¹⁰³ *Id.*; See *Martin v. Busch*, 93 Fla. 535 (Fla. 1927).

¹⁰⁴ *Beach Renourishment*, 130 S.Ct. at 2611.

lakebed, causing the lakebed to become dry land.¹⁰⁵ The Florida Supreme Court found that this land, obviously below the original mean high-water line, continued to belong to the State after becoming dry land.¹⁰⁶ Hence, the case suggested, as Justice Scalia pointed out that Florida law allows the state to fill in its own seabed and treats the act as an avulsion.¹⁰⁷ For Justice Scalia, this meant that the littoral property owners' right to accretions was subordinate to the states' right to fill.¹⁰⁸ This is consistent with the Florida Supreme Court's decision in the case, where the court concluded that the littoral rights were not implicated by the project because of existing state property law principles.¹⁰⁹

Using this analysis, Justice Scalia held in Part V of his opinion that no judicial taking occurred when the Florida Supreme Court found in favor of the State in granting the beach restoration permits.¹¹⁰

B. Justices Breyer and Kennedy's Concurrences

Justices Breyer, Ginsburg, Kennedy, and Sotomayor concurred in part and concurred in the judgment of the Court.¹¹¹ These four Justices found that the case could be resolved without reaching the Takings Clause issue.¹¹² In Justice Breyer's and Justice Kennedy's concurrences, both expressed concerns over the difficulties and consequences of recognizing the existence of judicial taking.¹¹³ Moreover, Justice Kennedy's concurrence, joined by Justice Sotomayor, suggested that substantive due process would be a more natural and better alternative for these cases than the path sought by the plurality opinion.¹¹⁴

First, Justices Breyer and Kennedy argued that it was not necessary for the Court to reach the constitutional issue in *Beach Renourishment*.¹¹⁵ Regarding complex constitutional questions, Justice Breyer pointed to the tradition of the Court in limiting its decisions to "only what is necessary to the disposition of the immediate case."¹¹⁶ In a cautious tone, Justice Breyer warned that the Court should decide only that the Florida Supreme Court

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Beach Renourishment*, 130 S.Ct. at 2613.

¹¹¹ *Id.* at 2592.

¹¹² *Beach Renourishment*, 130 S.Ct. at 2613 (Kennedy J., concurring).

¹¹³ *Beach Renourishment*, 130 S.Ct. at 2613 (Kennedy, J., concurring), 2618 (Breyer, J., concurring).

¹¹⁴ *Beach Renourishment*, 130 S.Ct. at 2615 (Kennedy, J., concurring).

¹¹⁵ *Beach Renourishment*, 130 S.Ct. at 2613 (Kennedy, J. concurring), 2618 (Breyer, J. concurring).

¹¹⁶ *Beach Renourishment*, 130 S.Ct. at 2619 (Breyer, J., concurring).

decision did not amount to a judicial taking.¹¹⁷ Chastising the approach of the plurality, Justice Breyer would avoid recognizing the definite existence of a judicial taking and would simply suggest that even assuming such takings could occur, the standard — whatever it may be — was not satisfied in this case.¹¹⁸ Justice Kennedy's concurrence echoed Justice Breyer's concerns, indicating that it was unwise for the Court to contemplate issues not considered at length by other courts and commentators.¹¹⁹

Justices Breyer and Kennedy also expressed several practical concerns. Justice Breyer was particularly worried about federal courts having to address Takings Clause issues in cases involving complex state law questions.¹²⁰ Foreseeing potentially large-scale federal interference in state matters, Justice Breyer advocated for a more deliberate consideration of the consequences of recognizing a judicial taking.¹²¹ In his concurrence, Justice Kennedy disclosed fears that a judicial takings doctrine might grant too much power to the judiciary.¹²² In his view, such a doctrine could provide a judge with too much discretion in awarding changes in beneficial property rights.¹²³ Moreover, Justice Kennedy was troubled by how a judicial takings claim would be properly raised. Namely, his concern was that the takings issue would not be litigated in the action that created the substance of the judicial takings claim.¹²⁴ The question then becomes whether the plaintiff must bring a second action arguing that the first constituted a judicial taking by its change in property law.¹²⁵ This collateral action would seem to offend the doctrine of *res judicata*, but would pass scrutiny because the judicial takings issue would not arise until after such a taking took place.¹²⁶

Justice Kennedy's other practical concern was the appropriate remedy.¹²⁷ In his view, precedent from prior Takings Clause cases suggested that the Court was only entitled to award damages, but not equitable relief.¹²⁸ In prior cases, the Court held that a suit for compensation was the only appropriate remedy for Takings Clause cases.¹²⁹ Justice Kennedy attributed this rule to the language of the Clause itself. Since the Clause does not prohibit the state from taking private property

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Beach Renourishment*, 130 S.Ct. at 2617-18 (Kennedy, J., concurring).

¹²⁰ *Beach Renourishment*, 130 S.Ct. at 2618-19 (Breyer, J., concurring).

¹²¹ *Id.* at 2619.

¹²² *Beach Renourishment*, 130 S.Ct. at 2616 (Kennedy, J., concurring).

¹²³ *Id.*

¹²⁴ *Id.* at 2616-17.

¹²⁵ *Beach Renourishment*, 130 S.Ct. at 2617.

¹²⁶ *Id.*

¹²⁷ *Id.* at 2617.

¹²⁸ *Id.* (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984)).

¹²⁹ 130 S.Ct. at 2617 (citing *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 321-22 (1987)).

from individuals, but merely the taking of such property without just compensation, the most logical remedy for Takings Clause claims is awarding just compensation.¹³⁰ Dovetailing this premise with the possibility of a less restrained judiciary, courts willing to find judicial takings could feel reassured that their decisions rearranging property rights would merely require compensating the affected party.¹³¹ For Justice Kennedy, this kind of power was too much, preferring instead to leave it vested in the other branches because they are subject to political control with accompanying checks on abuses of such powers.¹³²

Justice Kennedy's concurrence also mentioned that the Court's position would be better suited for a due process analysis.¹³³ He believed that the Court "would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is 'arbitrary or irrational' under the Due Process Clause."¹³⁴ Justice Kennedy further suggested that the Due Process Clause protects property interests that are secured by "existing rules or understandings."¹³⁵ In his view, the Due Process Clause thus prevents the judiciary from affecting a taking that would be prohibited by the Takings Clause if done by the legislature.¹³⁶ Therefore, in conjunction with the expressed practical concerns, Justice Kennedy eschewed recognizing judicial taking in favor of using a substantive due process analysis.

In his opinion, Justice Scalia attempted to refute these various criticisms of his view of judicial taking.¹³⁷ Unlike Justice Kennedy, Justice Scalia found Justice Breyer's "assuming without deciding" approach to be inappropriate in this instance.¹³⁸ In his view, this represented a different kind of case than the precedent cited by Justice Breyer.¹³⁹ Here, unlike in those circumstances, the constitutional right being established was a "point of relative detail."¹⁴⁰ Moreover, Justice Scalia cited other instances where the Court had recognized the existence of a constitutional right, had established a test for the violation of that right, and then had gone on to find that the claim at issue did not satisfy the newly established test.¹⁴¹ Justice Scalia chastised Justice Breyer for implicitly accepting a standard by which

¹³⁰ *Beach Renourishment*, 130 S.Ct. at 2617 (Kennedy, J., concurring).

¹³¹ *Id.* at 2616-.

¹³² *Id.* at 2618.

¹³³ *Id.* at 2615.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Beach Renourishment*, 130 S.Ct. at 2615 (Kennedy, J., concurring).

¹³⁷ *Beach Renourishment*, 130 S.Ct. at 2602-08.

¹³⁸ *Id.* at 2603-04

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 2603-04.

¹⁴¹ *Id.* at 2603-04 (citing *Strickland v. Washington*, 466 U.S. 688, 687, 698-700 (1984); *Hill v. Lockhart*, 474 U.S. 52, 58-60 (1985); *Jackson v. Virginia*, 443 U.S. 307, 313-320, 326 (1979)).

to judge judicial takings in concluding that one does not exist here.¹⁴² Justice Scalia also took issue with Justice Kennedy's use of the Due Process Clause to resolve the issue. Pointing to *Albright v. Oliver*¹⁴³, Justice Scalia suggested that the Court had already found that substantive due process should only be a secondary consideration where a particular constitutional amendment provides an "explicit textual source of constitutional protection."¹⁴⁴ Moreover, Justice Scalia pointed to the Court's position that the rights protected by substantive due process do not include economic liberties.¹⁴⁵ He believed that Justice Kennedy's position insinuated a return to "the *Lochner* era."¹⁴⁶ Justice Scalia also mentioned that even if due process were a suitable alternative to the Takings Clause, it would suffer from the same practical problems that Justice Kennedy identified concerning that clause.¹⁴⁷

With respect to other practical concerns in the concurrences, Justice Scalia argued that they were easily solved.¹⁴⁸ Regarding remedies, Justice Scalia believed mandating compensation would be a rare remedy, similar to legislative or executive takings.¹⁴⁹ Instead, the appropriate remedy in his view was to reverse the lower court's judgment.¹⁵⁰ This too would highlight the appropriate time to raise the issue of judicial taking. That is, a party may allege that a judicial taking has occurred in appeal of the lower court's decision.¹⁵¹ Finally, Justice Scalia also addressed Justice Kennedy's concern that judicial taking may give judges too much discretion.¹⁵² In response, Justice Scalia said that the answer lied in the remedy, which would not mandate compensation, but instead would require only reversal of the lower court's decision.¹⁵³ This, to Justice Scalia, would limit the enthusiasm of courts to exercise their powers under the Takings Clause.¹⁵⁴ Further, Justice Scalia found Justice Kennedy's enthusiasm for using substantive due process in this area incongruous given the amorphous application of the doctrine.¹⁵⁵

¹⁴² *Beach Renourishment*, 130 S.Ct. at 2603-.

¹⁴³ *Albright v. Oliver*, 510 U.S. 266, 273 (1994).

¹⁴⁴ *Beach Renourishment*, 130 S.Ct. at 2606 (quoting *Albright*, 510 U.S. at 273).

¹⁴⁵ *Beach Renourishment*, 130 S.Ct. at 2606.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 2607.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Beach Renourishment*, 130 S.Ct. at 2607.

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 2607-08.

V. ANALYSIS AND CONCLUSION

With Justice Stevens taking no part in the decision of this case, an eight-member Court was confronted with the difficult issues surrounding an alleged judicial taking.¹⁵⁶ While a majority of the Court reached consensus regarding Parts I, IV, and V of Justice Scalia's opinion, only four members of the Court, Justices Scalia, Roberts, Thomas, and Alito, were willing to recognize the existence of a judicial taking.¹⁵⁷ Justices Breyer, Kennedy, Ginsburg, and Sotomayor, on the other hand, refused to recognize such a taking, finding it unnecessary given the context of the case.¹⁵⁸ While this posture suggests that the case's holding only stands for the judgment in the case, it does reflect an increasing willingness by this Court to tackle Takings Clause issues. Even more interesting is that were the Court to address this issue again, newly appointed Justice Kagan would likely be a key vote on the matter.

The fragmented court in *Beach Renourishment* reflects the complex and difficult issues that arise when attempting to apply the Takings Clause to the judicial branch. Courts routinely make decisions impacting property rights. Because of this, if a majority of the Court were to recognize the existence of judicial taking, a finely tuned standard would be absolutely critical to avoid opening the floodgates to new litigation. Justice Scalia's "established right" standard in *Beach Renourishment* may be a tenable and thus persuasive proposition. Largely skirting the dubious issues associated with an over-inclusive standard, the "established right" standard defangs a potentially cataclysmic judicial Takings Clause, while pushing a logical and textual view of the Takings Clause generally. Of course, if this is the future of judicial taking, then why the heated debate? If a court's decision strips a party of his or her established property rights, then he or she would merely be entitled to the same rights as if the action were performed by another branch of government. The ramifications of this proposed standard are something less than earth shattering, and may make the judicial taking more palatable moving forward.

¹⁵⁶ *Id.* at 2597.

¹⁵⁷ *Id.* at 2597.

¹⁵⁸ *Beach Renourishment*, 130 S.Ct. at 2613 (Kennedy, J., concurring).